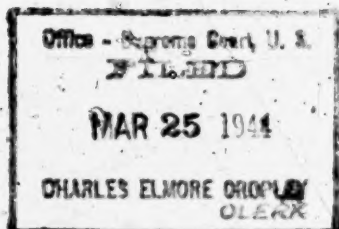


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No. **159** 35

In the Supreme Court of the United States

OCTOBER TERM, 1943

GUSTAV H. KANN, PETITIONER

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute involved.....	2
Statement.....	3
Argument.....	9
Conclusion.....	14

CITATIONS

Cases:

<i>Boggs v. United States</i> , 96 F. (2d) 734, certiorari denied, 305 U. S. 698.....	10
<i>Bradford v. United States</i> , 129 F. (2d) 274, certiorari denied, 317 U. S. 683.....	10
<i>Brady v. United States</i> , 26 F. (2d) 409, certiorari denied, 278 U. S. 621.....	10
<i>Decker v. United States</i> , No. 729, this Term.....	4, 10
<i>Delaney v. United States</i> , 263 U. S. 586.....	14
<i>Hastings v. Hudspeth</i> , 126 F. (2d) 104, certiorari denied, 316 U. S. 692.....	10
<i>Mitchell v. United States</i> , 126 F. (2d) 550.....	10
<i>Newingham v. United States</i> , 4 F. (2d) 490, certiorari denied, 268 U. S. 703.....	10
<i>Stern v. United States</i> , 134 F. (2d) 931, certiorari denied, 319 U. S. 774.....	10
<i>Tincher v. United States</i> , 11 F. (2d) 18, certiorari denied, 271 U. S. 664.....	10
<i>United States v. Johnson</i> , 319 U. S. 503.....	14
<i>United States v. Kenofsky</i> , 243 U. S. 440.....	10
<i>Weiss v. United States</i> , 120 F. (2d) 472, certiorari denied, 314 U. S. 687.....	10

Statute:

Section 215 of the Criminal Code, 18 U. S. C. 338.....	2
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 759

GUSTAV H. KANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 214-218) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 4, 1944 (R. 218-219). The petition for a writ of certiorari was filed on March 4, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in connection with a scheme to defraud a corporation and its stockholders by diverting profits through a subsidiary company to the defendants in the form of salaries, bonuses, etc., the use of the mails in the collection of checks representing part of the diverted profits constitutes use of the mails in execution of the scheme.

2. Whether the evidence is sufficient to sustain petitioner's conviction.

STATUTE INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause

to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than \$1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner and others were indicted, in the District Court of the United States for the District of Maryland, in three counts charging use of the mails in execution of a scheme to defraud. In substance, the scheme charged was one to divert from Triumph Explosives, Inc., and its stockholders a large part of the profits earned and to be earned by Triumph, by creating a corporation known as the Elk Mills Loading Corporation, subletting to it Triumph's contract with the Government for the manufacture of incendiary bombs, and distributing a large part of the diverted profits to the defendants in the form of salaries, dividends, bonuses, etc.¹ Petitioner was president and a director of Triumph; his codefendant, Decker, was vice president and a director; and the other defendants were employees of Triumph (R. 188, 191-192). Petitioner's codefend-

¹ The indictment does not appear in the record, but appears at pp. 5-15 of the stenographic transcript of record certified and filed with the Clerk pursuant to stipulation of the parties (see R. 219-220).

ants pleaded *nolo contendere* (Pet. 4).² Petitioner was tried alone, convicted on the second and third counts, and sentenced to imprisonment for three years and to pay a fine of \$2,000 (R. 127). On appeal to the Circuit Court of Appeals for the Fourth Circuit, his conviction was affirmed (R. 214-218).

The evidence for the Government may be summarized as follows:

Triumph Explosives, Inc., whose stock was widely held by the public (R. 132), obtained a contract on November 27, 1941, for the manufacture of incendiary bombs (R. 1). On December 2, 1941, at the request of William L. Kann, Jr., petitioner's nephew, Triumph's attorney organized a corporation known as the Elk Mills Loading Corporation (R. 59-60, 206). Petitioner and some of the other defendants discussed a plan whereby the bomb contract would be sublet to the Elk Mills Corporation, which it was contemplated would be a wholly independent company with stock owned by petitioner, Decker, and five of the employee defendants. William Kann, Jr., was not to be a stockholder (R. 67-68, 85). That plan was disapproved by petitioner's brother-in-law, Weil, an attorney, who informed petitioner that in his opinion directors of Triumph could not legally own stock in a corporation which expected

² The defendant, Decker, under the present indictment, is the petitioner in *Decker v. United States*, No. 729, this Term, which, however, involves a wholly separate indictment.

to obtain a subcontract from Triumph (R. 64, 67-68). At a special meeting on December 11, 1941, the directors of Triumph, among whom were petitioner and Decker, approved a plan whereby 45 percent of the stock of Elk Mills was to be issued to five employees of Triumph, including William Kann, Jr., who were personally to acquire and deed to Elk Mills a site for the erection of a plant. Fifty-five percent of the stock was to be issued to Triumph in consideration of Triumph's subletting to Elk Mills the incendiary bomb contract and transferring to Elk Mills advance payments to be obtained from the Government (R. 1-5). The reasons given by the minutes of that meeting for the proposed arrangement were that under Triumph's loan agreement with the Peoples Pittsburgh Trust Company and the Federal Reserve Bank of Cleveland, Triumph could not make the capital expenditures required to fulfill the contract, and that the five employees to whom the 45 percent of the stock of Elk Mills was to be issued were key men and were threatening to leave because of dissatisfaction with their compensation from Triumph, which could not be increased without the consent of the banks (R. 1-5). The Elk Mills arrangement was, however, to be subject to the approval of the banks (R. 5); and after some discussion the banks took the position that it was not in violation of their loan agreement with Triumph (R. 42). The stock of Elk Mills was issued in accordance with the approved arrangement, and officers and directors

of Elk Mills were elected (R. 30, 85, 161-163, 166-168). Petitioner, his nephew, and Decker constituted a majority of the board of directors (R. 166).

At another special meeting on March 17, 1942, the directors of Triumph approved a modification of the subcontract with Elk Mills whereby Triumph would furnish to Elk Mills Triumph's own employees, would provide light, heat, and other services, and would receive as compensation five cents per bomb produced (R. 5-7). Although the minutes of that meeting record five directors as present (R. 5), two of those allegedly present heard no discussion of the Elk Mills transaction and did not know of the existence of Elk Mills until October 1, 1942 (R. 132, 135-136, 139-140, 164). Another director, who was not present at the meeting, likewise was not informed of the existence of Elk Mills until October 1, 1942 (R. 142-143). Under Triumph's bylaws, the three directors (two of whom were petitioner and Decker) who admittedly were present and approved the modification of the subcontract did not constitute a quorum (R. 158-159). Moreover, the notices of the special meetings of December 11, 1941, and March 17, 1942, contained no reference to the Elk Mills transactions as the subject matter of the meetings despite the fact that, under Triumph's bylaws, such notice of the subject matter to be dealt with was required (R. 158-160).

Although the plan approved by Triumph's directors called for the acquisition of the building site by the five additional owners of Elk Mills stock (*supra*, p. 5), Triumph bought and paid for the property and took the deed in its name (R. 61-62, 146-149, 155, 157-158). The arrangements for the acquisition of the property were made by Decker (R. 146). A deed to the property from Triumph to Elk Mills was never recorded (R. 148-149, 157). Nevertheless, the individual owners of the Elk Mills stock directed the contractor who was erecting the building on the site to use timber taken therefrom, and billed him for \$12,000 worth of timber. The contractor in turn billed Triumph for that amount and, after receiving payment, gave a check for the same amount to the individual stockholders of Elk Mills (R. 8-17, 152-157). The cost of cutting the timber was also paid by Triumph (R. 181). Petitioner approved the payment of the lumber bill to the contractor by Triumph (R. 17-20, 24). The check, dated July 22, 1942, given by the contractor to the individual Elk Mills stockholders, was cashed by the payees at the Peoples Bank of Elkton, Maryland, and was deposited by that bank in the United States mails to be delivered to the Wilmington bank on which it was drawn (R. 7). This check was the basis of the second count of the indictment (R. 116).

On January 2, 1942, at the organization meeting of Elk Mills, a salary of \$5,200 per annum was

voted to each of the defendants named in the indictment (R. 166-169). This action, at a time when the corporation had no assets and had not actively commenced operations, was severely criticized by Weil, petitioner's brother-in-law, who wrote petitioner that the fixing of nominal salaries for petitioner and Decker would protect them from possible charges by stockholders of Triumph that the formation of the subsidiary was a subterfuge to obtain additional compensation (R. 196-201). On March 17, 1942, the directors of Elk Mills voted to each of the defendants a bonus of \$5,000, in recognition of their work in eliminating delays in production (R. 169-171); \$40,000 was advanced by Triumph on the sub-contract to cover such payments (R. 89, 172-173). Petitioner's activities for Elk Mills, according to his own testimony, consisted of administrative matters and attempts to put Elk Mills on its own credit standing (R. 96). The bonuses and a substantial part of the salaries were paid to the defendants (R. 79, 171, 181). The bonus check to the defendant Willis was deposited in his bank at Newark, Delaware, and was mailed by that bank to the Peoples Bank of Elkton, Maryland, on which it was drawn (R. 8). It formed the basis of the third count of the indictment (R. 118).

Elk Mills, from the time of its inception to July 31, 1942, received \$600,000 from Triumph on the incendiary bomb contract. The net profit of Elk Mills as of July 31, 1942, after salaries and

bonuses had been paid but before taxes were deducted, was in excess of \$200,000 (R. 53, 181). In August 1942, the Navy Price Adjustment Board commenced an investigation of Triumph and its subsidiaries (R. 176). It uncovered the lumber deal (*supra*, p. 7) and questioned petitioner and others concerning it. Petitioner denied knowledge of it, but stated that all interested parties would be willing to undo what had been done (R. 180; see R. 94, 163). When the Navy Department investigator questioned the necessity for the organization of Elk Mills in order to satisfy "key" employees, Weil, in the presence of petitioner and Decker, admitted that petitioner, Decker, Willis, and Kann, Jr., would not have left Triumph and that only three employees were threatening to resign (R. 179). After the Navy Department investigation, the five individual stockholders of Elk Mills transferred their stock to Triumph (R. 137, 174, 187) and the Navy Department took over the operation of Triumph's plant in October 1942 (R. 137, 186).

ARGUMENT

I

Contrary to petitioner's contention (Pet. 18-34), the decision below presents no conflict with decisions of other circuits on the issue of whether the mailing of the checks was in execution of the scheme to defraud. The courts are agreed that if the mails are used as part of a continuing

fraudulent scheme; the mailing is within the interdiction of the statute. Cf. *United States v. Kenofsky*, 243 U. S. 440, 443; *Bradford v. United States*, 129 F. (2d) 274, 276 (C. C. A. 5), certiorari denied, 317 U. S. 683; *Hastings v. Hudspeth*, 126 F. (2d) 194, 196 (C. C. A. 10), certiorari denied, 316 U. S. 692; *Weiss v. United States*, 120 F. (2d) 472, 475 (C. C. A. 5), certiorari denied, 314 U. S. 687; *Bogy v. United States*, 96 F. (2d) 734, 740 (C. C. A. 6), certiorari denied, 305 U. S. 608; *Brady v. United States*, 26 F. (2d) 400, 401 (C. C. A. 9), certiorari denied, 278 U. S. 621; *Tincher v. United States*, 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Newingham v. United States*, 4 F. (2d) 490, 492 (C. C. A. 3), certiorari denied, 268 U. S. 703. The Fifth and Tenth Circuits, upon whose decisions petitioner relies (Pet. 25-26), have so held in recent cases. *Steiner v. United States*, 134 F. (2d) 931, 934 (C. C. A. 5), certiorari denied, 319 U. S. 774; *Mitchell v. United States*, 126 F. (2d) 550, 554 (C. C. A. 10).³

Here the scheme charged in the indictment was not merely to obtain \$12,000 by the lumber transaction and \$40,000 in bonuses. It was a scheme

³ The question is discussed, and the authorities cited by petitioner are distinguished, at pages 6-12 of the Brief in Opposition to the petition for certiorari in *Decker v. United States*, No. 729, this Term. The decision in the *Decker* case was relied upon by the court below in the instant decision (R. 218; see Pet. 49).

to divert the profits of Triumph to the defendants through Elk Mills by salaries, dividends, bonuses, and otherwise. That scheme was clearly intended to continue at least as long as Elk Mills was performing the incendiary bomb contract. It did in fact continue until terminated in October 1942, following the Navy Department investigation. Hence, it is unimportant to determine at what precise moment Triumph was defrauded of the particular part of its profits represented by the checks which formed the basis of the indictment.⁴

The mailing of the checks was merely a part of the general scheme which was intended to, and did, continue after the checks were paid by the banks on which they were drawn. Obviously the clearing of these checks, as also the clearing of subsequent checks that it was contemplated would be issued, was not only in furtherance of, but was essential to the effectuation of, the scheme to defraud.⁵

⁴ For this reason we make no distinction between the check which was cashed (*supra*, p. 7) and the check which was deposited in the payee's account (*supra*, p. 8). In order to sustain petitioner's fine in the amount that it exceeds \$1,000, both counts on which petitioner was convicted must be sustained.

⁵ The court charged the jury with care and particularity that it must not merely find the existence of a fraudulent scheme and the use of the mails, but that it must be satisfied "beyond a reasonable doubt that the use of the mails was in connection with and in furtherance or in execution, as we say, of the scheme itself" (R. 113). Since the question

II

Petitioner's contention that the evidence is insufficient to support his conviction (Pet. 18, 34-44) is likewise without merit. The court below was clearly correct in holding that the composite picture presented by all the facts is one of fraud (R. 216). Petitioner argues (Pet. 34-37) that the directors of Triumph were justified in believing that the banks would not authorize increased capital expenditures by Triumph itself and that the organization of Elk Mills was therefore a necessary business arrangement. However, the banks did consent to the Elk Mills arrangement (*supra*, p. 5) and did, in March 1942, authorize additional capital expenditures by Triumph (R. 186). The jury was therefore warranted in believing that the handicaps of the loan agreement were more technical than real. Moreover, even assuming that the organization of a subsidiary corporation to perform the incendiary bomb contract was desirable, the manner in which Elk Mills was organized indicates an attempt to use that device, not for legitimate purposes, but as a means of obtaining unjustified personal profits. In this connection, it is significant that the original plan

whether a particular use of the mails was "for the purpose of executing" the fraudulent scheme is one of fact, we submit that this issue is foreclosed by the verdict of the jury, rendered, as it was, upon proper instructions.

called for the issuance of one-seventh of the stock to petitioner and Decker; that, when that plan was dropped, 5 percent of the stock was issued to petitioner's nephew, who was not originally contemplated as a stockholder; that the formation of Elk Mills was not disclosed to the other directors of Triumph; that the contract of March 17, 1942, was approved by less than a quorum of the board of directors; that petitioner, his nephew, and Decker constituted a majority of the directors of Elk Mills and were in a position to dictate its policy (R. 166); that the directors of Elk Mills were unwilling to wait until the corporation was in active operation to approve substantial salaries to the officers and employees; and that petitioner's own account of his services for Elk Mills shows no basis for the payment to him of a \$5,000 bonus (see Statement, *supra*, pp. 4-8). Petitioner denied knowledge only of the lumber deal (R. 80, 92-94, see Pet. 43-44). Wholly apart from the contractor's testimony that petitioner approved the payment by Triumph (*supra*, p. 7), petitioner's connection with the whole scheme was so intimate that the jury was clearly justified in inferring that he was aware of that arrangement.

The district court and the circuit court of appeals have found that the verdict is based upon substantial evidence, and we submit that there is

no need of further review, the evidence by this Court. *United States v. Johnson*, 319 U. S. 503, 518; *Delaney v. United States*, 263 U. S. 586, 589-590.

CONCLUSION

The decision below is correct. The case presents no conflict of decisions and no question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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MARCH 1944.